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Supreme Court, U.S.
FILED
JUL 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2031

In The
Supreme Court of the United States
October Term, 1985

UNITED STATES OF AMERICA,

Petitioner,

v.

SOL C. SCHWARTZ and RAYMOND F. LANE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT SOL C. SCHWARTZ IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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20 pp

QUESTION PRESENTED

Whether the Double Jeopardy Clause prohibits a government appeal of a judgment of acquittal based on the district court's determination that the government failed to prove certain factual averments in the indictment which were required under the Ninth Circuit's then-existing decisions to be proved to sustain a conviction of the offenses charged.

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COUNTERSTATEMENT OF THE CASE

The trial in this action ended on March 7, 1984, when at the close of the government's case, the district court granted respondents' motion for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. Respondents argued that the government had failed to prove a long list of facts essential to prove the scheme to defraud alleged in the indictment, thus resulting in an absence of proof necessary to convict the defendants of the offenses charged. C.A. App. at 45-79. The district court based its judgment of acquittal on the then-existing law of the Ninth Circuit, which precluded a conviction for wire fraud if the proof at trial showed a scheme to defraud that did not include all parts alleged in the indictment. *United States v. Mastelotto,* 717 F.2d 1238 (9th Cir. 1983); *United States v. Miller,* 715 F.2d 1360 (9th Cir. 1983), *modified,* 728 F.2d 1269 (1984), later *reversed,* — U.S. —, 105 S. Ct. 1811 (1985).[1] The district court found "several gaping areas" of unproved facts essential to a conviction. App. to Petition for Certiorari at 36a. Stating that it was unnecessary to mention more of the defects in the government's proof, the district court specifically stated that the government had failed to produce evidence from which the jury could find that respondents intended to defraud four of the six union benefit plans that were included in the indictment. *Id.*

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[1] In a pretrial motion, respondents had moved to dismiss the indictment because it charged them with acts that did not constitute a unitary "scheme." C.A. App. at 15-23. Relying on *United States v. Mastelotto,* the district court denied this motion but instructed the government that it would be required to prove at trial each part of the scheme as alleged. App. to Petition at 35a.

The government appealed pursuant to 17 U.S.C. 3731.[2] The court of appeals granted respondents' motion to dismiss the appeal on the ground that it was barred by the Double Jeopardy Clause. The court held that the district court had "acquitted" the defendants under the then-applicable law of the Ninth Circuit as to wire fraud, reflected in its decisions in *United States v. Miller* and *United States v. Mastelotto*. The court of appeals held that the district court had correctly applied these precedents in ruling that the government's proof was legally insufficient to sustain a conviction. The government petitioned for rehearing. The court of appeals denied rehearing on the double jeopardy issue.

The government argued below that the district court's decision was appealable as an erroneous dismissal of the indictment. The district court's action was not an acquittal, the government claimed, because the court did not find that the government had failed to prove any of the essential statutory elements of the offense of wire fraud. Addressing the court of appeals, the government argued that the district court misapplied the holdings of *Miller* and *Mastelotto*—an argument not presented to this Court. In the alternative, the government argued that *Miller* and *Mastelotto* were wrongly decided. Under this Court's decision in *United States v. Miller*, announced over a year after the judgment of acquittal in the instant case, failure to prove parts of a scheme to defraud would no

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[2] Recognizing that the district court had found the government's evidence insufficient, the government stated that it did not appeal "the findings of insufficient evidence as to the Local 19 benefit plans, the Local 28 Contra Costa plans, or Marolda as a trustee of the Local 19 plans." C.A. App. at 166.

longer preclude a conviction for wire fraud if the government proved a narrower scheme than was included in the indictment.

The government seeks to obtain a reversal of the judgment of acquittal and to subject respondents to a second trial on the parts of the original charges for which the district court made no explicit finding of insufficient evidence.

REASONS FOR DENYING THE PETITION

I. BECAUSE THE DISTRICT COURT ASSESSED THE EVIDENCE AND FOUND IT INSUFFICIENT FOR A CONVICTION, ITS ACTION WAS AN ACQUITTAL, REGARDLESS OF THE GOVERNMENT'S CONTENTION THAT THE DISTRICT COURT ERRED.

The protection against double jeopardy attaches when the action of the trial court was an "acquittal." *United States v. Scott*, 437 U.S. 82, 91 (1978). As the government has stressed, an acquittal occurs when there has been "a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). Moreover, "'the category of acquittals includes 'judgment[s] . . . by the court that the evidence is insufficient to convict.'" *Smalis v. Pennsylvania*, — U.S. —, 106 S.Ct. 1745, 1748 (1986) (quoting *United States v. Scott*, 437 U.S. 82, 91 (1978)).

The pertinent counts of the indictment[3] charged respondents with engaging in a scheme to defraud and using wire communications in furtherance of the scheme, as well as conspiracy to engage in the same scheme to defraud. To obtain a conviction on these charges, according to the law of the Ninth Circuit at the time of the district court's ruling, the government's proof at trial must have been sufficient to establish each part of the scheme to defraud alleged in the indictment. For example, if the indictment alleged six parts to the unitary scheme to defraud, the government was required to prove at trial that all six parts had indeed existed; otherwise conviction for the entire scheme would fail for lack of proof. *United States v. Mastelotto,* 717 F.2d at 1250. *United States v. Miller,* 715 F.2d at 1363.

It cannot be disputed that the district court found the proof at trial was insufficient to sustain a conviction for wire fraud as charged in the indictment. In ruling on respondents' motion for a judgment of acquittal, the district court reviewed the evidence as to the six benefit plans described in the indictment and explicitly stated that there was "practically no evidence" and "absolutely no evidence" of fraud with respect to four of them. App. to Petition at 36a. The court therefore ruled that "in the light of the evidence a reasonable juror could not find beyond a reasonable doubt that the defendants had participated in a unitary scheme to defraud as charged in the indictment." *Id.* at 36a-37a. In sum, the court considered the govern-

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[3] Counts 12 and 13 of the indictment were dismissed before trial in a ruling reversed by the court of appeals. They are not involved in the government's petition.

ment's evidence in light of the legal requirements for conviction, and found it insufficient.

Accordingly, this case is indistinguishable from many cases in which this Court has held that the Double Jeopardy Clause bars a government appeal or a retrial. *See, e.g., Smalis v. Pennsylvania,* — U.S. —, 106 S. Ct. 1745, 1748-49 (1986); *Arizona v. Rumsey,* 467 U.S. 203, 211 (1984); *Sanabria v. United States,* 437 U.S. 54, 78 (1978); *Fong Foo v. United States,* 369 U.S. 141, 143 (1962). In these cases this Court has repeatedly rejected attempts by the government to appeal erroneous trial court rulings as to the sufficiency of evidence. Only weeks ago this Court reaffirmed that " '[T]he fact that "the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles" . . . affects the accuracy of that determination but it does not alter its essential character.' " *Smalis v. Pennsylvania,* 106 S. Ct. at 1748-49 n.7, (quoting *United States v. Scott,* 437 U.S. 82, 98 and 106 (1978)) (opinions of the Court and of Justice Brennan, dissenting).

In the attempt to evade the reach of this Court's precedents, the government asserts that a new criterion should be introduced into Double Jeopardy Clause analysis. The government argues that the district court's finding of insufficient evidence is not an "acquittal" because "the district court mistakenly believed" that the government was required to prove additional facts. Petition at 11. The government's argument is completely dependent on its characterization of the district court's ruling as one that involved only "nonessential factual averments." Petition at 8. It cannot be disputed that the district court believed

that "essential" facts had not been proved. The district court erred, in the government's view, in determining *which* facts were essential to a conviction. The government contends that because of this error the district court's finding that the evidence was insufficient to allow a conviction was not an acquittal.

But on this very point this Court has decided at least two cases that directly refute the government's contention. In *Smalis v. Pennsylvania,* the Commonwealth argued that the trial court " 'erred in deciding what degree of recklessness was required to be shown under Pennsylvania's definition of [third degree] murder.' " 106 S. Ct. at 1748 n.7 (quoting the transcript of oral argument). The Commonwealth contended, in other words, that the trial court had erred in its interpretation of what facts—bearing on the degree of negligence—were essential to a conviction. If the district court's ruling in the instant case was not an "acquittal" because of error in determining which were the essential facts, then neither would the trial court's ruling in *Smalis* have been an acquittal. But this Court unanimously held in *Smalis* that such a challenge to the trial court's reasoning has no bearing on the double jeopardy issue. Regardless of legal error as to what facts are, indeed, essential, the trial court's ruling was an acquittal.

To the same effect is *Sanabria v. United States,* 437 U.S. 54 (1978). *Sanabria* involved a trial court's legal error in ruling that to convict under a law proscribing an "illegal gambling business" the prosecution was required to prove that the defendant was involved with "games of competition," which, according to the trial

court, included horse races but not numbers-betting. 437 U.S. at 56-58. Disregarding evidence of numbers-betting, the trial court entered a judgment of acquittal because there was no evidence of horse-betting. On the government's appeal, the First Circuit held that the trial court had erroneously interpreted the charges to include only horse-betting and that this erroneous ruling did not bar retrial of the numbers-betting charges. The First Circuit noted that the district court had not found evidence of the numbers-betting charge insufficient but had, in effect, erred in defining what evidence was essential to prove the offense charged. *Id.* at 61-62.

This Court reversed the First Circuit's decision, holding that "the Double Jeopardy Clause absolutely bars a second trial in such circumstances." *Id.* at 78.

The numbers-betting charge in *Sanabria* is like the parts of the alleged scheme about which the district court, in the instant case, made no explicit finding that evidence was lacking. This Court held that the Double Jeopardy Clause barred a second trial in *Sanabria* on the numbers-betting, notwithstanding that the district court had erred as a matter of law when it ruled that evidence of numbers-betting was not sufficient for a conviction. Thus, in *Sanabria* this Court rejected an argument equivalent to the government's contentions here.

This Court's decision in *Arizona v. Rumsey*, 467 U.S. 203 (1984), reinforces the conclusion that the double jeopardy bar applies in this case. *Rumsey* involved a trial court's legal error in defining the elements the government was required to prove in the sentencing phase of a capital case. Although the state appellate court subse-

quently held that the trial court's legal conclusion in framing the required elements had been erroneous under state law, this Court held that the Double Jeopardy Clause barred reprosecution of the defendant's sentencing phase. 467 U.S. at 211. "Reliance on an error of law . . . does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits." *Id.*

The government attempts to distinguish *Smalis* and *Sanabria* by asserting that "the district court merely found that the government's failure to prove averments in the indictment resulted in a violation of respondents' rights under the Grand Jury Clause." Petition at 11 and 10 n.10. According to the government's theory, the district court's ruling was not an "acquittal" because the district court based its "mistaken belief" about what evidence was essential on the Grand Jury Clause. Petition at 11. Thus, the applicability of the Double Jeopardy Clause turns, in the government's view, on whether the district court was relying *solely* on the statutory elements of wire fraud or conspiracy as the basis for its finding that the evidence was insufficient. If the district court based its finding on *both* the statute defining the offense and cases construing the Constitution so as to create further requirements as to the proof sufficient for conviction of the offense charged, then, the government argues, an acquittal has not occurred.

But there is no precedent of this Court supporting this view. Moreover, the government's view is irreconcilable with the long line of this Court's decisions holding a finding of insufficient evidence to be an acquittal even if it is based on an erroneous understanding of the law

defining what facts must be proved to sustain a conviction. *Smalis,* 106 S. Ct. at 1748-49; *Sanabria,* 437 U.S. at 68-69. These cases must be read to hold that, where a district court has terminated a trial favorably to defendants based on findings as to the sufficiency of evidence, scrutiny of the reasoning underlying the findings is irrelevant and impermissible for purposes of double jeopardy analysis.[4]

The government attempts to draw an analogy between the district court's ruling in this case and the category of cases involving dismissal of an indictment as legally insufficient to allege a crime despite sufficient proof at trial. Simply put, the rulings in the latter category are not acquittals because they do not involve any " 'resolution of factual issues going to the elements of the offense charged'," *Smalis,* 106 S. Ct. at 1749, (quoting *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 570 (1977)). *See Lee v. United States,* 432 U.S. 23, 26 (1977); *Illinois v. Somerville,* 410 U.S. 458, 459 (1973).

The district court's ruling in the instant case was denominated an acquittal, and correctly so. It terminated the action based on the insufficiency of evidence to convict respondent of the offenses charged in the indictment. *Smalis, Sanabria,* and other decisions of this Court preclude the government's attempt to avoid the Double

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[4] The government cites *Russell v. United States,* 369 U.S. 749 (1962), and *Stirone v. United States,* 361 U.S. 212 (1960), in which *defendants* successfully appealed from convictions based on facts not charged in their indictments. (*See* the discussion of *Stirone* in *United States v. Miller,* 105 S. Ct. at 1816-17.) Neither case involved a double jeopardy question, neither involved any finding—correct or erroneous—of insufficiency of evidence, and neither supports the government's position.

Jeopardy Clause by parsing the thought processes involved in the district court's finding of factual insufficiency.

II. THE GOVERNMENT'S THEORY, THAT THERE IS NO DOUBLE JEOPARDY BAR WHEN THE TRIAL COURT FINDS THAT THERE IS INSUFFICIENT PROOF OF "NONESSENTIAL FACTUAL AVERMENTS", DOES NOT APPLY TO THIS CASE.

The government asserts that the district court made findings only as to "nonessential factual averments." If, by its use of the phrase "nonessential factual averments", the government means that the allegation of six, rather than five or fewer parts of the scheme to defraud was "nonessential" to a valid indictment, then its point is irrelevant to the issue at hand. The validity of the indictment in this case is not disputed; indeed, the district court expressly ruled that the indictment was sufficient. App. to Petition at 35a. If, on the other hand, the government's argument is that the proof of all six parts of the scheme alleged in the indictment was "nonessential" to obtain a conviction, then its argument must fail. As stressed in the preceding section, even if the district judge was mistaken in treating certain proof as "essential" to sustain a conviction, its ruling in favor of the defendants was an acquittal.

Moreover, this proof *was* essential to sustain a conviction according to prevailing Ninth Circuit law at the time. The government's petition does not challenge the holding of the Ninth Circuit that the district court correctly applied the Ninth Circuit's rulings in *Mastelotto* and *Miller*. And the government's petition does not, and cannot, chal-

lenge the holding of the Ninth Circuit that under its *Mastelotto* and *Miller* cases it was essential to a conviction for the government to prove averments for which there was absolutely no evidence.[5]

The government is thus left with only one argument in this context, and this argument is not explicit in its petition; that is, that this Court's reversal of *Miller* subsequent to trial justifies a retrial. The reason why this proposition is only implicit in the government's general argument is obvious: The Double Jeopardy Clause would be eviscerated if changes in the law subsequent to trial could justify retrial.

This Court has described "the most fundamental rule in the history of double jeopardy jurisprudence" as the principle that "'[a] verdict of acquittal . . . [may] not be reviewed . . . without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.'" *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (quoting *United States v. Ball*, 163 U.S. 662, 671 (1896)). If the Double Jeopardy Clause forbids a court from reversing an acquittal by changing the law on appeal in the same case, it necessarily forbids a court from reversing an acquittal because the law has been changed by a decision in another case. This Court has stated that the Double Jeopardy Clause "guarantees that the state shall not be permitted to make repeated attempts to convict the accused, 'thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a con-

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[5] The government did not appeal and does not now challenge the district court's explicit findings of insufficiency of evidence.

tinuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' '' *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)). This guarantee is empty if changes in the law subsequent to trial are given any consideration whatsoever in determining the conclusiveness of a trial court's judgment of acquittal.

III. THE CIRCUITS ARE NOT IN CONFLICT.

The government places its heaviest reliance on the Third Circuit's decision in *United States v. Maker*, 751 F.2d 614 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 3479 (1985). But the language the government quotes from *Maker* would be error if applied in the different procedural context of this case.

Maker involved not a judgment of acquittal after the government's case in chief, but a dismissal after a hearing on the first day of testimony in the trial. The district court reviewed the indictment and certain transcripts of defendants' testimony from a civil trial. *Maker*, 751 F.2d 619-20. In *Maker* the procedural posture of the hearing on defendants' motion was not one that subjected them to the risk that they would be found guilty nor one that involved an assessment of sufficiency of the evidence the government had offered.

The district court in *Maker* made a legal error in concluding that a wire fraud charge requires the government to prove that *before* the first act furthering a scheme to defraud, the defendants intended and planned every act that ultimately played a part in the scheme. *Maker*, 751

F.2d at 619. Before the government had called its second witness, the district court declared it "impossible" to prove an intent to submit fraudulent insurance claims concerning accidents that had not yet occurred. *Id.*

Accordingly, the district court in *Maker* did not purport to assess the sufficiency of the prosecution's evidence, but rejected the logic of the prosecution's *proposed* factual theory. A far different kind of decision was made in the instant case, where the district court had heard the prosecution's case in chief and found a lack of evidence of facts it considered essential. This difference between this case and *Maker* means that the circuits are not in direct conflict.

Some language in *Maker* suggests that the double jeopardy effects of a decision turn solely on whether it involved error in a "legal determination about the elements of a single scheme conviction." 751 F.2d at 623. Based on its facts, *Maker* need not be reduced to this proposition; but the proposition, applied to the instant case, would be contrary to this Court's interpretation of the double jeopardy protection in *Smalis v. Pennsylvania*, 106 S. Ct. at 1748-49; *Sanabria v. United States*, 437 U.S. 54, 75; *Arizona v. Rumsey*, 104 S. Ct. 2305, 2310-11; and *Fong Foo v. United States*, 369 U.S. at 141, 143. A "conflict among the circuits" created by a circuit decision at odds with this Court's decisions is no reason to grant a petition for certiorari in a case consistent with this Court's precedents. *See, e.g.*, Rules of the Supreme Court, Rule 17(c) (noting that a writ of certiorari is appropriately granted in order to resolve a conflict in the federal courts over a question which "*has not been*, but should be, settled by this Court") (emphasis supplied).

This Court's subsequent decision in *Smalis*—that a ruling of insufficiency of evidence is an acquittal even if based on an erroneous legal premise as to what facts are required for a conviction—has resolved any potential for uncertainty. Moreover, the Third Circuit has in its decision in *United States v. Giampa*, 758 F.2d 928 (3d Cir. 1985), subsequently correctly applied the pertinent principles under the Double Jeopardy Clause.

In *Giampa*, the Third Circuit held that the Double Jeopardy Clause barred retrial of a defendant acquitted of extortion and various related crimes. The trial judge had made some comments during the course of the trial which seemed to indicate that he would order an acquittal because of the government's failure to disclose some evidence arguably helpful to defendant, in violation of the rule of *Brady v. Maryland*, 373 U.S. 83 (1963). 758 F.2d at 934. If the trial judge had ordered an acquittal on the basis of the *Brady* violation alone, the Double Jeopardy Clause would not bar retrial. The trial judge, however, also made statements which purported to evaluate the sufficiency of the government's evidence. The Third Circuit held that this evaluation, which resulted in a favorable judgment for the defendant, amounted to an acquittal according to the standards of *Martin Linen* and *United States v. Scott*. 758 F.2d at 934.

Accordingly, *Maker* does not justify granting the government's petition for certiorari in the instant case.

Finally, the government's broad claim that the Ninth Circuit's ruling "raises doubts about the double jeopardy consequences of every district court order granting relief

to a defendant because of a fatal variance between the allegations on the indictment and the proof at trial" (Petition at 12) is simply not true. The "fatal variance" in this case led to an acquittal because of the particular—and now overruled—precedents of the Ninth Circuit regarding evidence required to prove mail fraud and wire fraud. Under this Court's long line of cases, an acquittal that was based on those Ninth Circuit precedents bars appeal by the government, even though the precedents were erroneous, because of the protections of the Double Jeopardy Clause.

CONCLUSION

For each of the reasons stated above, the Petition for Certiorari should be denied.

Respectfully submitted,

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